

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7378

UNITED STATES OF AMERICA and
GOVERNMENT OF THE VIRGIN ISLANDS

v.

DELROY FRANCIS,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE VIRGIN ISLANDS

(D.C. Criminal No. 97-cr-00156)
District Judge: Honorable Thomas K. Moore

ARGUED APRIL 12, 1999

BEFORE: Nygaard, McKee and Rendell, Circuit Judges.

(Filed JUN 21 , 1999)

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MEMORANDUM OPINION OF THE COURT

NYGAARD, Circuit Judge.

Defendant/Appellant Delroy Francis appeals his judgment and conviction for possession of a firearm with an obliterated serial number in violation of 18 U.S.C. § 922(k) and for possession of an unlicensed firearm in violation of 14 V.I.C. § 2253. Francis was convicted after a trial by jury on the charges.

Francis raises two main issues on appeal: (1) the prosecutor improperly commented during closing argument on Francis's silence at the time of his arrest in violation of Francis's Fifth Amendment right; and (2) the government failed to sustain its burden of proof as to the local count because the

government did not present any evidence concerning licensing of the firearm in St. Croix. We review the prosecutor's comments for harmless error. See United States v. Young, 470 U.S. 1, 13 (1985). We may affirm the verdict if, viewing the evidence in a light most favorable to the Government, a reasonable juror could conclude that Francis committed the charged offense. See Glaser v. United States, 315 U.S. 60 (1942). We will affirm.

Discussion

Because the parties are familiar with the facts and we do not write for publication, we will only discuss those facts necessary to our determination. We conclude first that the prosecutor's comments were cured by the District Court's limiting instruction. Francis argues that the prosecutor's closing comments concerning Francis's silence constitute reversible error. Here, however, the trial court gave a curative instruction.

During his closing argument, the prosecutor stated:

There's been no evidence presented that[Francis] left [the gun] on the ground, that perhaps he walked to one of the doors, since that is a residential neighborhood, there are a lot of homes in the Smith Bay area, to tell someone that there was a gun in the bushes, so that they should be careful, perhaps they should call the police; no evidence about that.

And even when the police arrived, if he had just

found it, you would think that he would have immediately walked up to the police officer and said, "Officer, I found a gun in the bushes and I want to turn it over to you. I was planning on coming to the police station"; no evidence of that nature.

Jt. App. at 157A.

After the prosecutor's closing argument, the defense moved for a mistrial. See id. at 162A. The trial court denied the defense motion but asked if the defense wanted a limiting instruction. At that point, the defense requested a curative instruction to disabuse the jury of any "Inference which may be in their heads, that... [Francis] was responsible to make... statements to the police"

THE COURT: Do you want me to give any additional instructions, other than the standard one, on the defendant's right not to testify?

MS. WALCOTT: I would ask for the -instruction in the alternative, that advises the jury that a defendant does not have to take the stand. Because I think that what this, what the argument creates is some inference which may be in their heads, that perhaps he was responsible to make these statements to the police at the time the police

Id. at 169A.

The court agreed with the defense request and indicated that a curative instruction would be included:

THE COURT: All right. I'll include that, something along those lines, in the instruction on how to handle his admission; just basically to say something that he did, while he didn't have to say anything his Fifth Amendment protection, and he chose to make a statement, and you can consider what he said.

Id.

The court crafted a curative instruction and read it to defense counsel to determine if it was appropriate. It said,

THE COURT: I'm going to put as an introductory paragraph to what was page 32 the following, which I think represents what we discussed at side-bar:

"You should not infer that the defendant had any obligation to say anything to the police at the basketball hoop in Smith Bay. I instruct you that he had no such obligation. You have heard evidence, however, that Mr. Francis did say something, and you may consider that testimony as follows:

- and then give the instruction on it. All right?

MS. WALCOTT: Yes.

Id. at 191A.

The trial court instructed the jury that the Government always has the burden of proof and the Francis had no obligation to testify or present evidence. See id. at 200A-01A.

Specifically, the trial court instructed:

THE COURT: You may not attach any significance to the fact that Mr. Francis did not testify in this case. No inference of any kind may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in any way as you deliberate in the jury room.... As stated before, the lawful [sic] never imposes on the defendant in a criminal case the burden of calling any witnesses or producing any evidence.

Id. at 200A. It was in this context that the trial court read the curative instruction. We conclude that the curative instruction cured any error committed by the prosecutor.

This case is similar to those in which the prosecutor's closing impermissibly uses a defendant's post arrest silence to impeach a subsequent explanation. See, e.g., Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Balter, 91 F.3d 427, 439 (3d Cir. 1996). Francis has argued that the prosecutor violated his rights by the comments. This argument ignores the effect of the trial court's curative instruction. Indeed, in United States v. Balter, 91 F.3d at 439, we noted that there was no Doyle violation "where the trial court gives a curative instruction informing the jury that the defendant's post arrest silence is not evidence and cannot be used to infer guilt."

The trial court instructed the jury that Francis had no obligation to testify or present evidence and that no inferences may be drawn from Francis's silence. Given these instructions, and its curative instruction, the trial court avoided a Doyle violation.

We also conclude that the prosecutor's comments were harmless beyond a reasonable doubt in view of the overwhelming evidence against Francis. See id. at 440. We have "recognized that Doyle violations are harmless beyond a reasonable doubt where the evidence against the defendant is 'overwhelming.'" Id. (citing United States v. Dunbar, 767 F.2d 72, 76 (3d Cir. 1985)).

In Balter, the trial court gave a limiting instruction intended

to cure the prosecutor's comments. Without ruling on the adequacy of the trial court's limiting instruction, we noted that the prosecutor's error "was harmless beyond a reasonable doubt in light of the overwhelming evidence admitted against [the defendant] at trial." Id.

Upon close consideration, the evidence against Francis is overwhelming. Francis's brief recognized this as it makes a significant admission - "the evidence against appellant was not weak." Appellant's brief at 12. Indeed, Francis made admissions that inculpated himself. For example, he stated that he found the gun in the bushes and put it in his car and admitted that he had no license for the gun. These admissions were corroborated by the police recovery of a .22 caliber rifle from Francis's car; the Bureau of Alcohol, Tobacco and Firearms determination that the recovered weapon was a .22 caliber rifle with an obliterated serial number; and testimony that Francis did not possess a license in the St. Thomas/St. John District.

Clearly, in light of the overwhelming evidence against Francis, the error committed by the prosecutor during his closing was harmless beyond a reasonable doubt. For this reason too his conviction will be affirmed.

In addition, Virgin Islands law does not explicitly require that the government prove the firearm was not licensed in all

three U.S. Virgin Island Districts. Here the government offered adequate proof that the firearm was not registered in either St. Thomas (where Francis resides and was arrested) or St. John via the testimony of Officer Athenia Brown, who conducted a firearms search of the name Delroy Francis, and Francis's own admission that the firearm was not licensed in St. Thomas. The type of proof argued by Francis is akin to proving that a defendant in the continental United States was not licensed in any of the fifty states. This burden is similar to requiring the government to negate every statutory exception to the firearm license requirement, a burden the prosecutor need not bear. See United States v. McKie, 112 F.3d 626, 631 (3d Cir. 1997).

Francis argues that there was insufficient evidence from which a jury could find him guilty on Count II and seeks a judgment of acquittal on that count. However, when the evidence is viewed in a light most favorable to the Government, it is clear that there was sufficient evidence from which a jury could find beyond a reasonable doubt that Francis was guilty of possessing a firearm without a license.

We have held that:

[A]n appellate court must sustain the verdict of a jury if there is substantial evidence, viewed in a light most favorable to the Government, to uphold the jury's decision. In determining whether evidence is sufficient, we will not weigh evidence or determine the credibility of witnesses. Appellate reversal on the grounds of insufficient evidence should be confined to cases where the failure of the prosecution

is clear. The evidence need not be inconsistent with every conclusion save guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt.

United States v. Cardona-Usquiano, 25 F.3d 1194, 1201 (3d Cir. 1994). In light of that standard, we have recognized that "a defendant challenging sufficiency of the evidence bears a heavy burden." Id. Because Francis has failed to meet that burden, the jury's verdict will be affirmed.

Indeed, the evidence against Francis is overwhelming. Francis made several significant admissions, each of which support his conviction on Count II. First, Francis admitted that he found the firearm in question. See Jt. App. at 59A. Second, he admitted that the car in which the weapon was found was his car. See id. Third, he admitted that he had no license to possess the firearm. See id. While those admissions provided significant evidence that Francis violated 14 V.I.C. § 2253, they do not stand alone. Corroborative evidence supports Francis's admissions and his conviction on Count II.

Indeed, the police recovered a firearm from Francis's car. See id. at 59A. Additionally, the testimony of Officer Brown that Francis had no license to possess a firearm in the St. Thomas/St. John District, at least in part, corroborated Francis's admission that he had no firearm license. See id. at 50A. Certainly, the jury could view Athenia Brown's testimony as adequate corroboration from which they could infer that

Francis's admission concerning his lack of a firearm license was accurate not only as to the St. Thomas and St. John district, but also to St. Croix. Given that the government is entitled to all such favorable inferences from the evidence presented and given the statements of Francis and the corroborating evidence presented, there was sufficient evidence from which a jury could find Francis guilty as to Count II.

Conclusion

In sum we conclude that the prosecutor's remarks during closing argument did not violate Francis's Fifth Amendment right against self-incrimination. The prosecutor commented on statements Francis could have said, but did not say, at the time the gun was found. Given the curative instruction of the trial court in response to the prosecutor's closing comments, as well as the overwhelming evidence supporting conviction, we find no reason why Francis's conviction should not be affirmed. Additionally, given the overwhelming weight of the evidence, and all the favorable inferences therefrom to which the government is entitled concerning Francis's possession of a firearm in violation of Title 14 V.I.C. § 2253, the trial court conviction is affirmed.

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JUDGMENT

This cause came to be heard on the record from the United States District Court for the Virgin Islands and was argued by counsel on April 12, 1999.

On consideration whereof, it is now ordered and adjudged by this court that the judgment of the district court entered June 5, 1998, be and the same is hereby **AFFIRMED.**

ATTEST:

/s/ P. Douglas Sisk

Clerk

Date: **JUN 21, 1999**